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6 IN THE UNITED STATES DISTRICT COURT

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10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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MARY J. YAKAS, on behalf of herself and
all others similarly situated,

No. C 09-02964 WHA

Plaintiff,

v.

**ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS**

14 CHASE MANHATTAN BANK, U.S.A.,
15 N.A., predecessors, successors, and
16 subsidiaries, and DOES 1-100, names and
17 addresses currently unknown,

Defendants.

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INTRODUCTION

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In this proposed class action, defendant Chase Manhattan Bank moves to dismiss
plaintiff's breach-of-contract and unjust-enrichment claims. For the reasons stated below, the
motion to dismiss is **DENIED**.

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STATEMENT

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On July 1, 2009, plaintiff commenced this action. Defendant moved to dismiss. That
motion was granted with leave to amend. On November 19, plaintiff filed a first amended
complaint alleging breach of contract and unjust enrichment. Now ripe for decision is a new
motion to dismiss.

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Plaintiff is a resident of Concord, California. She desires to represent a class of borrowers
who entered into home equity lines of credit also known as HELOCs. Defendant is a national
retail banking institution with branch offices throughout California and across the United States.

1 In April 2004, plaintiff entered into her HELOC agreement with defendant. Plaintiff's
2 HELOC had a \$71,750 credit limit that was secured by her Concord property. In order to obtain
3 this HELOC, defendant required plaintiff to submit an appraisal by a licensed appraiser of her
4 property. The appraisal valued plaintiff's property at \$718,000.

5 Paragraph 14 of the HELOC agreement required plaintiff to pay a non-refundable annual
6 fee. Paragraph 14 stated:

7 **14. ANNUAL PARTICIPATION FEE.** You agree to pay us a non-
8 refundable Annual Participation Fee of \$20.00 during the Draw Period and any
9 extension of the Draw Period. Unless you terminate your Credit Account and pay
the outstanding balance, the Annual Participation Fee will be charged to your
Credit Account annually during the Draw Period in the Monthly Statement Period
ending in your anniversary month which we assign to your Credit Account.

10 Oddly, the term Draw Period was *not* defined in the HELOC agreement, and the parties dispute
11 its meaning. Plaintiff says it meant, "any period during which the borrower could draw from the
12 HELOC account." Defendant says it meant the same as Advance Period, which was defined in
13 the HELOC agreement as "a period of 120 Monthly Statement Periods after the date [plaintiff's]
14 Credit Account is opened." Defendant also asserts that the term was defined in defendant's initial
15 loan application disclosure to plaintiff and that that definition was consistent with the definition
16 of Advance Period. The initial disclosure stated, "You can obtain credit advances ("Advances")
17 for 10 years (the "draw period") in all states . . .". Oddly, this document has a place for the
18 customer's initials in the lower right, but none were inserted.

19 Plaintiff paid the annual fee in April 2004 when she opened her account, and then
20 annually on her anniversary month up to April 2008.

21 Paragraph 16 of the HELOC agreement allowed defendant to alter plaintiff's credit
22 privileges. Paragraph 16 stated:

23 **16. CANCELLATION OF CREDIT PRIVILEGES.** We can refuse
24 to make additional extensions of credit, or reduce your Credit Limit if:

25 a.) The value of the Property declines significantly below its original
26 appraised value for purposes of this Credit Account.

27 The HELOC agreement did not define "significantly" or specify how the value of plaintiff's
28 property should be determined for purposes of altering plaintiff's credit privileges.

1 On December 13, 2008, defendant unilaterally suspended future draws on plaintiff's
2 HELOC, stating that the valuation of plaintiff's property no longer supported her line of credit.
3 Defendant used an Automated Valuation Model ("AVM") to assess the value of plaintiff's
4 property. How the AVM model worked is a mystery on the present record. At the time defendant
5 suspended plaintiff's HELOC, the AVM estimated the value of plaintiff's property at \$674,000.
6 After the estimate, plaintiff had \$24,181 available to draw upon her HELOC. In April 2009,
7 plaintiff's anniversary month, defendant charged plaintiff the \$20 annual fee.¹

8 In connection with the valuation of plaintiff's property, the parties dispute at least two
9 things. *First*, the parties dispute how the value of plaintiff's property should have been
10 determined for purposes of altering plaintiff's credit privileges. Plaintiff alleges that an
11 established "course of dealing" required defendant to obtain an appraisal by a licensed appraiser
12 prior to altering her credit privileges. Defendant replies that it was not limited to any specific
13 valuation method, let alone an appraisal by a licensed appraiser. Defendant relies on the Federal
14 Reserve Board's Official Staff Interpretations ("FRB Official Interpretations") to Regulation Z,
15 which implemented the Truth in Lending Act, to argue that an appraisal was not required before
16 suspending plaintiff's credit privileges.

17 *Second*, the parties dispute the reliability of the AVM. Again, the specifics of the model
18 actually used are completely unknown on the immediate record. Aside from that, plaintiff alleges
19 that the AVM was unreliable because it did not take into account any improvements made to her
20 property or the unencumbered equity in her property. Plaintiff also alleges that the AVM was
21 unreliable because in November 2008, a month before her account was suspended, the Office of
22 Assessor for Contra Costa County valued her property at \$705,000, which is more than the
23 \$674,000 estimated by the AVM. Plaintiff alleges that the disparity in the valuations — \$705,000
24 in November 2008 and \$674,000 in December 2008 — shows the AVM was unreliable.
25 Defendant counters that the November 2008 valuation of \$705,000 now referenced by plaintiff
26 was actually made as of January 1, 2008 — not November 2008 or even December 2008 when

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28 ¹Given that plaintiff had a \$71,750 credit limit, she must have drawn already \$47,569 from her account
in order to have had \$24,181 available on her account when it was suspended.

1 plaintiff's account was suspended. Furthermore, defendant counters that as of January 1, 2009,
2 plaintiff's property was valued at \$615,000 by Contra Costa County. Defendant argues that the
3 progressive decline in plaintiff's property — \$674,000 in December 2008 and \$615,000 in
4 January 2009 — renders the AVM reliable. Defendant alleges that the AVM was reliable because
5 the proposed revision to the FRB Official Interpretations deems the use of an AVM to be an
6 appropriate property valuation method.

7 Paragraph 26 of the HELOC agreement contained a choice-of-law provision. Paragraph
8 26 stated:

9 **26. APPLICABLE LAW.** Except to the extent that federal law shall
10 be controlling, your rights, our rights, and the terms of this Agreement shall be
governed by Delaware law.

11 The parties agree that Delaware law should be applied to resolve any disputes arising out
12 of the HELOC agreement.

13 ANALYSIS

14 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
15 alleged in the complaint. *See Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1484 (9th. Cir.
16 1995). All material allegations of the complaint are taken as true and construed in the light most
17 favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th. Cir.
18 1996). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
19 factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
20 requires more than labels and conclusions, and a formulaic recitation of a cause of action’s
21 elements will not do. Factual allegations must be enough to raise a right to relief above the
22 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (citation omitted).

23 Although materials outside of the pleadings should not be considered without converting
24 the motion to a motion for summary judgment, a district court may consider all materials
25 submitted as part of the complaint including exhibits and documents to which the complaint
26 specifically refers and whose authenticity is not questioned even if they are not physically
27 appended to the complaint. A district court may take judicial notice of its own orders and of
28 records in a case before it as well as other matters of public record that are properly subject to

1 judicial notice. *Hal Roach Studios v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th
2 Cir. 1990).

3 This order involves a review of at least some documents essential to the claims,
4 documents specifically referred to in the complaint, and published reports regarding the value of
5 plaintiff's property. This does not mean that all materials necessary to finally interpret the
6 contract are before the Court.

7 **1. FIRST CLAIM: BREACH OF CONTRACT.**

8 Plaintiff's first claim alleges breach of contract. In order to survive a motion to dismiss
9 for failure to state a breach-of-contract claim, plaintiff must establish the existence of a contract,
10 the breach of an obligation imposed by that contract, and the resultant damage to plaintiff. *VLIW*
11 *Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

12 Here, plaintiff entered into a HELOC agreement with defendant in April 2004. Plaintiff
13 alleges that defendant breached the HELOC agreement in three different ways. *First*, plaintiff
14 alleges that defendant breached the HELOC agreement when it failed to obtain an appraisal by a
15 licensed appraiser prior to suspending her line of credit. In support of this allegation, plaintiff
16 asserts that defendant was obligated to obtain an appraisal because the parties established a course
17 of dealing. Plaintiff asserts that a "course of dealing" was established in three different ways:
18 plaintiff was required to obtain an appraisal prior to receiving her HELOC account; Paragraph 10
19 of the HELOC agreement allowed defendant to conduct an appraisal at any time during the life of
20 the HELOC; and plaintiff was required to obtain an appraisal in order to dispute defendant's
21 suspension of her account. (Actually, this is not a "course of dealing" per se but an interpretation
22 of a term by reference to the remainder of the agreement.) As a result of defendant's conduct,
23 plaintiff alleges that she was damaged because her property value was assessed incorrectly, which
24 directly led to the suspension of her line of credit.

25 In response to plaintiff's allegation that defendant was required to obtain an appraisal by a
26 licensed appraiser, defendant counters that the HELOC agreement was silent as to how the value
27 of plaintiff's property would be determined for purposes of altering her credit privileges.
28 Defendant replies that it was not limited to any specific valuation method and that using an AVM

1 was not a breach of the agreement. Furthermore, defendant references the FRB Official
2 Interpretations to argue that an appraisal was not required to suspend plaintiff's credit privileges.
3 The FRB Official Interpretations stated:

4 This provision does not require a creditor to obtain an appraisal before suspending
5 credit privileges although a significant decline must occur before suspension can
6 occur.

7 12 C.F.R. Part 226, Supp. I, ¶5b(f)(3)(vi) at 6.

8 Though defendant's arguments are plausible, they do not prove that plaintiff has failed to
9 state a breach-of-contract claim. It may well be that a licensed appraiser was not required
10 (without so holding), but that does not translate to an allowance of an AVM, much less a mystery
11 AVM whose particulars are totally a secret.

12 To be sure, Regulation Z placed some constraints on HELOC loans; but otherwise,
13 Regulation Z left it to the parties and their contracts to regulate their own relationship. So if the
14 parties had agreed that an appraisal *was* required that would be enforceable, even though not
15 required by Regulation Z. In other words, Regulation Z imposed some minimum requirements,
16 but the bank in its agreement was free to acquiesce in more limitations. Whether or not this
17 particular contract did so is the basic issue that will have to be decided either on summary
18 judgment or trial after a more full record. Therefore, Regulation Z in no way disposes of this
19 claim.

20 *Second*, plaintiff alleges that defendant breached the HELOC agreement because the
21 AVM was unreliable. In support of this allegation, plaintiff asserts that the defendant's AVM
22 was unreliable because it did not take into account any improvements made to plaintiff's
23 property, and it did not account for the equity in plaintiff's property. Plaintiff also asserts that the
24 AVM was unreliable because in November 2008, her property was valued at \$705,000, whereas
25 the AVM valued her property at \$674,000 a month later. Plaintiff relies on *Wilder v. JPMorgan*
26 *Chase Bank, N.A.*, No. 09-0834, slip op. at 5 (C.D. Cal. Nov. 25, 2009), to argue that this
27 decrease in valuation suggests that the AVM was unreliable. In *Wilder*, the defendant obtained an
28 AVM valuing the plaintiff's property at \$811,800 in April 2009. The plaintiff, however, obtained
29 an appraisal from a licensed appraiser valuing the property at \$970,000 in June 2009. The court

1 declined to dismiss the plaintiff's breach-of-contract claim holding that the difference between the
2 AVM and the full appraisal raised doubts as to the accuracy of the AVM. As a result of the
3 AVM, plaintiff alleges that she was damaged because her property value was assessed
4 incorrectly, which directly led to the suspension of her line of credit.

5 Defendant replies that the proposed revision to the FRB Official Interpretations states that
6 an AVM is an appropriate property valuation method. The proposed revision to the FRB Official
7 Interpretations states:

8 If not prohibited by state law, property valuation methods other than an appraisal
9 that may be appropriate to use under this provision include, but are not limited to,
10 automated valuation models, tax assessment valuations, and broker price
11 opinions. Any property valuation method must, however, consider specific
characteristics of the property, such as square footage and number of rooms, and
not merely estimate the value based on property values or re-sale prices generally
in a particular geographic area.

12 Proposed Rule, 74 Fed. Reg. 43,595 (Aug. 26, 2009) (to be codified at 12 C.F.R. Part 226).

13 Defendant also argues that plaintiff's reliance on *Wilder* is misplaced because here, plaintiff did
14 not allege that she ever obtained an appraisal valuing her property differently from defendant's
15 AVM. Defendant adds that as of January 1, 2009, plaintiff's property was valued at \$615,000 by
16 Contra Costa County, which defendant argues validates the AVM's assessment of \$674,000
17 because both demonstrate a decline in property value.

18 Though defendant's arguments are plausible, they cannot carry the day at the pleading
19 stage. As a preliminary matter, the proposed revision to the FRB Official Interpretations was
20 written well after the parties entered into the HELOC agreement, and it is hard to see how it could
21 have informed the contractual intent of the parties. Additionally, the proposed revision insists
22 that square footage, number of rooms, and other "specific characteristics" of the property be
23 considered. Did the AVM in question do so? Who knows? On this record, the AVM is a
24 complete secret. Discovery is essential. Consequently, plaintiff has alleged sufficient facts with
25 regards to the unreliability of the AVM to survive a motion to dismiss.

26 *Third*, plaintiff alleges that defendant breached the HELOC agreement by not pro rating
27 the \$20 annual fee after it suspended her credit line and by charging her yet another \$20 annual
28 fee after it suspended her credit line. Plaintiff asserts that Paragraph 14 of her HELOC agreement

1 permitted the bank to charge an annual fee only if she could draw from her HELOC account.
2 Plaintiff asserts that she paid the \$20 annual fee in April 2008 so that she could draw on her
3 account from April 2008 to April 2009, but because defendant suspended her account in
4 December 2008, she was prematurely prohibited from drawing from her account. Adding insult
5 to injury, plaintiff also asserts that defendant charged her another \$20 annual fee in April 2009,
6 even though her account remained suspended, *i.e.*, she was forced to pay a fee, but was denied the
7 benefits of the agreement.

8 Defendant responds that plaintiff misinterprets the term Draw Period. Defendant asserts
9 that Draw Period meant the same as Advance Period, which was defined in the HELOC
10 Agreement as “a period of 120 Monthly Statement Periods after the date [plaintiff’s] Credit
11 Account is opened.” Defendant supports this interpretation by referencing its initial loan
12 application disclosure to plaintiff, which defined Draw Period. The initial disclosure stated, “You
13 can obtain credit advances (“Advances”) for 10 years (the “draw period”) in all states . . .”. Using
14 this definition, defendant responds that the annual fee may be charged so long as the HELOC
15 account is open. As noted, plaintiff’s initials do *not* appear where they were supposed to be, so
16 one interpretation is that she never got the form.

17 Though defendant’s arguments are plausible, they do not defeat plaintiff’s allegations for
18 the purposes of a motion to dismiss. Why the agreement even uses the term “Draw Period” with
19 initial caps is a mystery. It appears to be intended as a defined term. Defendant says it was a
20 mere drafting error and asks the Court to willy-nilly correct it. These arguments are better suited
21 for a motion for summary judgment or trial — not a motion to dismiss. At this point, plaintiff has
22 alleged sufficient facts with regards to the annual fee to make her claim plausible.

23 * * *

24 In the briefing and at the hearing, there was a considerable side show over the meaning of
25 “significant decline.” Strictly speaking, this was not a basis for the motion to dismiss. Both sides
26 invoked their favorite passages from the pending *proposed* revision to the FRB Official
27 Interpretations. While these are interesting arguments, it is again hard to see how a regulation in
28 mere proposed form could be retroactively read into the instant contract years earlier as the intent

1 of the parties. Therefore, this order will place no reliance on the proposed regulation without
2 prejudice to the possibility that aspects of the proposal will have some relevance to expert
3 witnesses and subsequent proceedings.

4 For the reasons stated above, plaintiff has alleged sufficient facts to make her breach-of-
5 contract claim plausible. Consequently, defendant's motion to dismiss plaintiff's breach-of-
6 contract claim is **DENIED**.

7 **2. SECOND CLAIM: UNJUST ENRICHMENT.**

8 Plaintiff's second claim alleges unjust enrichment. In order to survive a motion to dismiss
9 for failure to state an unjust-enrichment claim, plaintiff must establish "(1) an enrichment, (2) an
10 impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of
11 justification and (5) the absence of a remedy provided by law." *Cantor Fitzgerald, L.P. v.*
12 *Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998). Furthermore, "a claim for unjust enrichment is not
13 available if there is a contract that governs the relationship between parties that gives rise to the
14 unjust enrichment claim." *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 891 (Del. Ch. 2009).

15 Plaintiff's allegations establish an unjust-enrichment claim. Here, plaintiff alleges that
16 defendant was unjustly enriched because it charged her an annual fee the year after it suspended
17 draws from her HELOC. Defendant was allegedly enriched by the \$20 annual fee, and plaintiff
18 was allegedly impoverished because she was charged the \$20 annual fee. There is a relation
19 between the enrichment and the impoverishment because both derive from the \$20 annual fee.
20 Furthermore, defendant allegedly lacked justification for charging the annual fee because it
21 suspended draws from plaintiff's HELOC account the previous year, and there is an absence of a
22 remedy provided by law.

23 Defendant argues that plaintiff should be barred from bringing an unjust-enrichment claim
24 because the conduct that forms the basis of plaintiff's claim — that defendant charged her an
25 annual fee the year even after it suspended draws from her HELOC — falls within the express
26 language of the HELOC agreement. Paragraphs 14 and 16 of the HELOC agreement directly
27 governed the conduct that plaintiff alleges was unjust. Paragraph 14 stated that plaintiff must pay
28 an annual fee during the draw period, and Paragraph 16 stated that defendant might alter

1 plaintiff's credit privileges if the value of her property declined significantly below its original
2 appraised value for purposes of her line of credit.

3 Plaintiff replies that she should be permitted to maintain her unjust-enrichment claim if
4 the Court finds Paragraph 16 of the HELOC agreement illusory, too ambiguous to be interpreted
5 or applied, or void. It is true that if plaintiff loses in her interpretation of the HELOC agreement
6 with respect to the \$20 annual fee, then Delaware law would bar her unjust-enrichment claim. On
7 the other hand, if plaintiff prevails in her interpretation of the HELOC agreement with respect to
8 the \$20 annual fee, the question of remedies will arise, and the Court may conceivably find that
9 defendant was unjustly enriched. At this point, the Court is unwilling to categorically exclude the
10 possibility that unjust enrichment will turn out to be an appropriate remedy. Consequently,
11 defendant's motion to dismiss plaintiff's unjust-enrichment claim is **DENIED**.

12 **CONCLUSION**

13 For the foregoing reasons, defendant's motion to dismiss is **DENIED**. Priority in discovery
14 shall be promptly given to learning the particulars of the AVM method without prejudice to
15 discovery into other matters.

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17 **IT IS SO ORDERED.**

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19 Dated: January 25, 2010

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21 WILLIAM ALSUP
22 UNITED STATES DISTRICT JUDGE

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